82-1360 NO. 82-

Office-Supreme Court, U.S.
FILED
FEB 10 1983
ALEXANDER L. STEVAS,

IN THE

Supreme Court of the United States

October Term, 1982

JOHN W. CROSS, JERRY J. DENEGALL and FRANK WILSON, individually and on behalf of all others similarly situated,

Petitioners,

vs.

LLOYD BAXTER, HENRY KLAR, DONNIE TURNER, WESLEY BALL and SHERROD McCALL, individually and as members of the City Council of Moultrie, Georgia; WILLIAM B. WITHERS, individually and as Mayor of the City of Moultrie, Georgia; MRS. RENNIE TUMLIN, individually and as Municipal Election Superintendent for the City of Moultrie, Georgia; W.E. KELLEY, W.B. LINDEN and E.W. RHODEN, JR., individually and as Election Managers for the City of Moultrie, Georgia; and their successors in office,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Questions Presented

1. Whether amended §2 of the Voting Rights Act of 1965, 42 U.S.C. §1973, applies to cases pending on the date of its enactment with the result that the Court of Appeals erred in refusing to consider, or remand to the District Court, Petitioners' claim that at-large elections for the Mayor and City Council of Moultrie, Georgia, resulted in the denial or abridgement of their right to vote in violation of §2?

2. Whether amended §2 created a standard for establishing a denial of voting rights different from that previously available under the Constitution?

3. Whether the Court of Appeals erred in affirming the trial court's decision that at-large elections for the Mayor and Council did not dilute minority voting

strength in violation of the Fourteenth and Fifteenth Amendments?*

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*This question will be argued in the event the Court grants the Petition for Writ of Certiorari.

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OPINIONS BELOW

The opinion and supplemental opinion of the United States Court of Appeals for the Fifth Circuit sought to be reviewed are reported at 639 F.2d 1383 and 688 F.2d 279 respectively and are appended hereto at 1a and 7a.

The denial of the petition for rehearing by the panel is unreported and is appended hereto at 10a. The denial of the petition for rehearing and suggestion for rehearing en banc is reported at 693 F.2d 135, and is appended hereto at 11a.

The previous opinion of the Court of Appeals remanding the case is reported at 604 F.2d 875, and is appended hereto at 13a.

The two opinions of the United States District Court for the Middle District of Georgia are unreported and are appended hereto at 50a and 87a.

JURISDICTION OF THE COURT

The opinion and supplementary opinion of the United States Court of Appeals for the Fifth Circuit sought to be reviewed were entered on March 20, 1981, and September 20, 1982, respectively. A timely petition for rehearing and suggestion for rehearing en banc was denied on November 12, 1982.

Jurisdiction to review the opinions below is conferred on this Court by 28 U.S.C. §1254(1).

STATUTES INVOLVED

The issues presented by this petition involve §2 of the Voting Rights Act of 1965, 42 U.S.C. §1973, appended hereto at 108a.

STATEMENT OF THE CASE

Petitioners are black citizens of Moultrie, Georgia.[1] They commenced this action on April 20, 1976, against the Mayor and City Council charging that their method of election at-large, including the use of numbered posts, staggered terms and majority vote and run-offs, diluted black voting strength in violation of the Fourteenth and Fifteenth Amendments and §2 of the Voting Rights Act of 1965, 42 U.S.C. §1973.[2] Jurisdiction in the District Court was invoked under 28 U.S.C. §§ 1331 and 1343.

1. The population of Moultrie is 14,302 people, approximately 35% of whom are black. 53a.

2. Petitioners also contended that Respondents failed to comply with §5 of the Act, 42 U.S.C. §1973c, in implementing the majority vote requirement in 1965 after the first blacks offered for city office. R. 133-34, 221-54 ("R" refers to the trial record). A district court of three judges heard the §5 claim and on May 10, 1977, enjoined further use of the uncleared practice. Cross v. Baxter, 604 F.2d 875, 878 n.1 (5th Cir. 1979), 14a, n.1.

The dilution claim was tried on the merits before District Judge J. Robert Elliot who denied relief on the grounds that "the Constitution does not require that elections must be somehow so arranged that black voters be assured that they can elect some candidate of their choice." 85-6a.[3]

Petitioners appealed and the Court of Appeals reversed. It held there was "substantial evidence, not discussed by the district court, tending to show inequality

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3. Judge Elliott has similarly ruled against black plaintiffs in other dilution cases on constitutional grounds, e.g. in Harris County, Georgia, Brown v. Reames, Civ. NO. 75-80-COL (M.D. Ga.), vacated and remanded, 618 F.2d 782 (5th Cir. 1980) and in Thomas County, Georgia, Thomasville Branch of N.A.A.C.P. v. Thomas County, Georgia, Civ. No. 75-34-THOM (M.D. Ga.), reversed and remanded, 639 F.2d 1384 (5th Cir. 1981). On remand, Judge Elliott concluded at-large elections in Thomas County were in violation of amended §2. Id., Order of January 26, 1983.

of access,"[4] that Petitioners "have demonstrated a history of pervasive discrimination and. . .have carried their burden of proving that the past discrimination has present effect,"[5] and that Petitioners

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4. Evidence of inequality of access cited by the Court of Appeals included the facts that "the all-white Lions Club supervises Moultrie City Council elections"; "after substantial numbers of blacks had begun to register and vote the City moved a polling place from a location convenient to residents of black neighborhoods to a less convenient location farther away"; "black candidates had encountered difficulties in campaigning in white neighborhoods"; and, "housing conditions, employment rates, income, and educational levels are considerably less advantageous for Moultrie blacks than for Moultrie whites." 604 F.2d at 880-81, 26-8a.

5. The Court of Appeals found "de jure discrimination in many facets of Moultrie government, including voting for public office"; [t]he number of black members on the City Council historically has been grossly disproportionate to the percentage of blacks in Moultrie's population, with only two black elected in the history of the town," both after the filing of this lawsuit and abolition of the majority vote requirement; "literacy tests were used in Moultrie until the mid-sixties"; "voting and registration were carried out on a segregated basis until the early sixties";

FOOTNOTE CONTINUED ON FOLLOWING PAGE...

"have demonstrated recent pervasive official unresponsiveness to minority needs."[6] Cross v. Baxter, 604 F.2d 875, 881, 883 (5th Cir. 1979), 27-8, 31-2, 38a. The case was remanded to the District Court with instructions to address the question of intent, an element of proof "in this circuit that...is required in voting dilution cases based on the Fourteenth and Fifteenth Amendments." 604 F.2d at 878 n.4, 17 a.

A second hearing was held on January 25, 1980, and Judge Elliott once again

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FOOTNOTE CONTINUED..."Moultrie schools were fully desegregated only in 1970"; and "public recreational facilities segregated by law unit 1968 or 1969." 604 F.2d at 881, 30-1a.

6. The Court of Appeals noted "that recreational facilities in the black areas of town are inferior to those in white areas"; "public housing projects were constructed in the 1950's that were segregated by law when built and that remain largely segregated today"; and cited "segregated voter lists"; "the city's delay in complying with requirements of §2 to the Voting Rights Act of 1965"; "operation of racially segregated jails, and racially selective enforcement of laws by City police." 604 F.2d at 883, 39-41a.

denied relief. 87 a.[7] The Court of Appeals affirmed. It held that "to maintain a voting dilution action...a plaintiff must establish that the governmental body in question is unresponsive to its

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7. Half of the court's opinion was devoted to showing that the Council was not unresponsive to minority needs. Although unresponsiveness is not a part of a plaintiff's case under §2, see p.15 infra, the factual premises upon which the District Court based its conclusion are clearly erroneous. For example, the court found there was "no high degree of de facto segregation in public housing in Moultrie." 100a. The evidence shows, however, that the 204 units of public housing in northwest Moultrie, a black area of town, are, and always have been, occupied exclusively by blacks. By the same token, in the public housing on the white side of town, there is only one black family in residence. R. IV 52-3, 126-27. The District Court also found that the failure to preclear the majority vote requirement "in fact operated to Plaintiff's advantage." 100a. Given the facts that the majority requirement excluded a plurality winning black from office in 1973, and a black first became elected to the Council only after abolition of the majority vote requirement, the court's finding is, quite simply, incredible. R. I 139-40, R. III 38-9.

legitimate needs," Cross v. Baxter, 639 F.2d 1383 (5th Cir. 1981), 3 a, and that since the District Court found Petitioners had failed to prove unresponsiveness, a finding it deemed not clearly erroneous, Petitioners were absolutely foreclosed from obtaining relief under the Constitution. Petitioners' §2 claim was rejected because the court concluded it provided no protection different from that contained in the Constitution itself.[8]

Petitioners filed a suggestion for rehearing en banc on the grounds that

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8. Cross II was one of three companion cases heard and decided by the panel: Cross was decided in favor of the defendants, Lodge v. Buxton, 639 F.2d 1358 (5th Cir. 1981), aff'd sub nom. Rogers v. Lodge, __U.S.__, 102 S.Ct. 3272 (1982), was decided in favor of the plaintiffs, and Thomasville Branch of NAACP v. Thomas County, Georgia, 639 F.2d 1384 (5th Cir. 1981), was reversed and remanded for further proceedings. It was in the Lodge opinion, which was made applicable to Cross, that the court ruled §2 did not provide a remedy for conduct not covered by the Constitution. 639 F.2d at 1364 n.11.

Cross II conflicted with McMillan v. Escambia County, Florida, 638 F.2d 1239, 1249 (5th Cir. 1981), which held that responsiveness is "simply irrelevant" in vote dilution cases, and Toney v. White 476 F.2d 203, 207 (5th Cir. 1973), aff'd en banc, 488 F.2d 210 (5th Cir. 1973), which held that any intention to discriminate was not required for a violation of §2. The suggestion was held in abeyance pending resolution by this Court of the appeal in the companion case of Lodge v. Buxton, 639 F.2d 1358 (5th Cir. 1981), aff'd sub nom. Rogers v. Lodge, __U.S.__, 102 S.Ct. 3272 (1982).

On June 29, 1982, President Reagan signed an act amending §2 which provided, effective immediately, that voting practices are unlawful under the statute which result in the denial or abridgment of the right to vote on account of race

or color. 108a. Two days later, on July 1, 1982, this Court decided Rogers v. Lodge, supra, which clarified the proof standards in constitutional voting rights challenges, and expressly reversed the ruling by the panel that proof of unresponsiveness was an essential element of a claim of vote dilution. 102 S.Ct. at 3280 n.9.

Petitioners renewed their pending motion for rehearing before the panel, stressing the controlling importance of the intervening amendment of §2 and the decision in Rogers v. Lodge, supra. The motion was denied without additional briefing or oral argument. 10a. On September 20, 1982, the panel, in a two page per curiam supplemental opinion, held the trial court's additional findings were not clearly erroneous and that Petitioners were not entitled to relief notwithstanding

Rogers. 7 a.[9] There was no discussion

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9. In concluding there was no unconstitutional denial of equal access, the District Court ignored much of the evidence, e.g. that Respondent Ball freely admitted "the primary thing" that had caused black candidates to lose in local elections was their race: "It's been on racial lines," R. IV 67-8; the uncontradicted evidence of slating, see n.15, infra; the imposition--without preclearance--of a literacy test in 1979 for new poll workers, the effect of which was to screen blacks under a new and more onerous standard than had been in effect when elections were run exclusively by the all white Lions Club, whose members continue to be grandfathered in as poll workers, R. IV 31-5, 40, P. Ex. II D; that the Lions Club has a history of discourtesty to blacks and turned away registered black voters from the polls in 1979, R. IV 239; the timing and effect of the majority vote requirement, see n.7, supra; the impact of the existing numbered post system; that Petitioner Cross was not consulted until after the Respondents had relocated the polling place to a location more distant from the black community, and that while Cross had no objection to voting being conducted at the new site, his preference was "to have polling places in all the areas that they have," R. IV 211; segregation in clubs, churches, private schools, the Junior Chamber of Commerce and business patronage, R. III 48-9, 92, 94-5, P. Exs. 37, 40, 44; and the rich evidence of racial polarization in voting. R. 136, 139-40, 269-70, R. II 296, R. III 102, P. Exs. 4, 11 A, B, C.

whatsoever of §2. Petitioners filed a second suggestion for rehearing en banc requesting the court to consider their §2 claim. The suggestion was summarily denied on November 12, 1982.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals' Failure to Apply Section 2 of the Voting Rights Act As Amended to Petitioners' Case Deprived Them of Due Process and Presents an Issue of Exceptional Importance.

The Court of Appeals refused to consider, or remand to the District Court, Petitioners' claim that at-large elections for the Mayor and Council of Moultrie, Georgia, violate §2 of the Voting Rights Act, 42 U.S.C. §1973. Section 2, amended by Congress on June 29, 1982, is a new standard for determining voting rights violations, and Petitioners, having properly pled the statute in their com-

plaint, were entitled to have it applied to their case.

It is well-established that "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." Bradley v. School Board of City of Richmond, 416 U.S. 696, 711 (1974). Accord, United States v. Alabama, 362 U.S. 602, 604 (1960).[8] The legislative history of the 1982 Act makes

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8. The Court of Appeals has complied with the rule in other cases. See e.g. Jones v. City of Lubbock, 640 F.2d 777 (5th Cir. 1981) (specially concurring opinion of Judge Goldberg) ("due process and precedent mandate that when the rules of the game are changed, the players must be afforded a full and fair opportunity to play by the new regulations.") (emphasis added); Brown v. Reames, 618 F.2d 782 (5th Cir. 1980).

clear beyond any doubt that Congress intended for the new statute to apply to pending cases. See 128 Cong. Rec. S7095 (1982) (remarks of Senator Kennedy) ("Section 2. . .will take effect immediately, and will, of course, apply to pending cases in accordance with the well established principles of Bradley v. City of Richmond, 416 U.S. 686 (1974) and United States v. Alabama, 362 U.S. 602 (1960)"); 128 Cong. Rec. H3841 (1982) (remarks of Representative Sensenbrenner) ("Section 2. . .will take effect immediately, and will, of course, apply to pending cases."). Moreover it would be a manifest injustice not to apply §2 to pending cases given Congress' overriding purpose in amending the Voting Rights Act to remedy the continuing effects of past discrimination in the electorate. Senate Rep. No. 97-417, 97th Cong., 2d Sess., 40 (1982) (herein-

after "Senate Rep."); House Rep. No. 97-227, 97th Con., 1st Sess., 31 (1981) (hereinafter "House Rep.") ("These Section 2 Amendments also provide an appropriate and reasonable remedy for overcoming the effects of this past purposeful discrimination against minorities.").

Section 2 provides that voting practices which result in the denial or abridgement of the right to vote on account of race or color are unlawful. 108a. In determining a violation under the results test of §2, Congress explicitly provided that the standard of proof was significantly different from that under the Constitution:

a. Proof of discriminatory purpose is not required to establish a violation of the statute, regardless of the standard of proof applicable in constitutional challenges. Senate Rep., 27-30; House

Rep., 28-32.[11] Cf. City of Mobile v. Bolden, 446 U.S. 55 (1980).

b. Unresponsiveness is not an element of a statutory violation, whatever its relevance in constitutional cases. Cf. Rogers v. Lodge, supra, 102 S.Ct. at 3280 n.9. Indeed, Congress provided that the use of responsiveness is to be avoided because it is a highly subjective factor which creates inconsistent results in cases presenting similar facts. Senate Rep., 29 n.116 ("The amendment rejects the ruling in Lodge v. Buxton and companion cases that unresponsiveness is a requisite

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11. The Senate as a whole adopted the version of the Act reported out of the Committee on the Judiciary, which was in turn adopted in whole by the House of Representatives, with the understanding that the effect of the §2 amendment was identical under either the original House bill or the Senate bill. 128 Cong. Rec. H3839-46 (1982).

element."); House Rep., 29 n.94, 30 ("The proposed amendment avoids highly subjective factors such as responsiveness of elected officials to the minority community.")

c. Foreseeability of consequences, while of apparently doubtful relevance to a constitutional violation, City of Mobile v. Bolden, supra, 446 U.S. at 71 n.17, is "quite relevant evidence" of a statutory violation. Senate Rep., 27 n.108.

d. Whatever limitations may exist on the scope of the constitutional bar against indirect intereference with the right to vote, see e.g. City of Mobile v. Bolden, supra, 446 U.S. at 65, and Rogers v. Lodge, supra, 102 S.Ct. at 3276 n.6, Section 2 embodies a functional view of the political process and prohibits a very broad range of impediments to minority participation in the electorate. Senate Rep., 30 n.120.

Not only is the §2 standard, which dispenses with the requirement of proof of racial purpose, less rigid and more lenient than that which the plurality in City of Mobile v. Bolden, supra, found under the Constitution, but the legislative history of the Act shows that Congress by specific reference to Cross v. Baxter I and II, supra, intended for the kind of evidence in this case to establish a violation of the statute, whatever the result under the Constitution. See Senate Rep., 39: "In Cross v. Baxter, a challenge to elections in Moultrie, Georgia, was rejected even though the evidence showed pervasive discrimination in the political process."

The evidence in this case, based upon facts which are uncontradicted in the record, establishes virtually every one of the factors identified

in the legislative history as illustrative of those which should prove a violation of amended §2, e.g. history of discrimination--particularly in registering and voting,[12] polarized voting,[13] racial

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12. This history was so gross and apparent that the District Court chided Petitioners' for devoting such "considerable time and effort in 'proving' a matter which required no proof and of which the Court takes judicial notice." 79 a. The Court of Appeals found that discrimination in Moultrie was "recent and pervasive". 604 F.2d at 881, 30a. See the evidence discussed by the court at n.5, supra, of the use of literacy tests, segregated voting, etc.

13. While the District Court found that whites in Moultrie do not vote "strictly" along racial lines, 55 a, the Court of Appeals concluded that the finding "on this record would be clearly erroneous" if the "district court intended to find that there is such an absence of racial bloc voting in Moultrie that a finding of dilution is foreclosed....No black candidate has ever received even a plurality of white votes and Wilson, the first black elected to the Council [after abolition of the majority vote requirement] appears to have received as little as 5% of white votes." 604 F.2d at 880 n.8, 24a. Evidence of bloc voting was the basis of the Department of Justice's objection when the majority vote requirement was submitted following the three-judge court's ruling in 1977. R.II 314-16.

campaign tactics,[14] slating,[15] disproportionate number of blacks elected to

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14. The District Court found in its supplemental opinion that "some black candidates have not felt comfortable in campaigning house to house in white neighborhoods." 94a. Also see 604 F.2d at 881, 28a, citing "evidence that black candidates had encountered difficulties in campaigning in white neighborhoods." The significance of race in local elections was graphically illustrated by a sign erected on the place of business of a defeated white candidate the day after the 1979 elections: "got beat by a black man--business for sale--leaving town." R.IV 189.

15. The evidence of slating, not discussed by either court below, involved blatant "cuing" by the white electorate in two elections. In the first, one of two white candidates withdrew from the May 23, 1978 election for Council Post 5 after a black entered the race, insuring that the black could not be elected by receiving less than a majority of votes as had happened following invalidation of the majority vote requirement by the three-judge court. Cross v. Baxter, supra, 604 F.2d at 878 n.1, 14a, R.II 296, R. III 102. The black candidate was defeated. P. Ex. II A, B, C ("P. Ex." refers to Petitioners' trial exhibits). In the second election held the following year, according to the uncontradicted testimony of a local white businessman and former candidate for public office, "most FOOTNOTE CONTINUED ON NEXT PAGE...

office,[16] distinctive minority socio-economic status,[17] past use of a majority vote requirement and present use of staggered terms and numbered posts.[18] Senate Rep., 28-9; House Rep., 30.

FOOTNOTE CONTINUED...businessman around... white businessmen" cued on a black candidate--a retired former waiter at a local hotel who had a seventh grade education and was a total political novice--for Council Post 3 to insure his election in order to give the appearance of racial fairness to city elections and thus defeat Petitioners' dilution lawsuit. R. IV 42, 56-8, 187-89.

16. The District Court in its supplemental opinion found "there has been an unquestioned disparity between the number of residents and the number of minority representatives" on the Moultrie City Council. 97 a.

17. The District Court also found in its supplemental opinion "the existence of socioeconomic inequities" between the races in Moultrie. 95 a. Also see n.4, supra.

18. 604 F.2d at 878 and n.1, 14 a.

Although Petitioners produced abundant and convincing evidence of a violation of amended §2, the District Court dismissed the complaint and the Court of Appeals affirmed without considering the §2 claim. Moreover, both courts applied standards developed in constitutional cases which Congress has determined are not applicable in statutory challenges under §2. Both courts, for example, placed heavy emphasis on unresponsiveness. The District Court devoted half of its supplemental opinion to the issue while the Court of Appeals devoted the entirety of its March 20, 1981, opinion and very nearly all of its September 20, 1982, opinion to unresponsiveness, concluding with reference to Rogers v. Lodge, supra, that "unresponsiveness is an important element" in determining minority vote dilution. 639 F.2d at 1383, 8a. Not only is unresponsiveness not an element of a

statutory violation, but Petitioners were required to prove racial purpose, a burden flatly inconsistent with Congressional intent in amending §2. The lower court found Petitioners had failed to prove intentional discrimination in the adoption or maintenance of at-large elections in Moultrie, but it did not, and could not on the record in this case, find that such elections do not result in the denial or abridgment of the right to vote.

The failure of the Court of Appeals to consider Petitioners' §2 claim, or remand to the District Court, deprived Petitioners of important rights conferred upon them by Congress. This deprivation justifies the grant of certiorari, and either full review in this Court or an order remanding to the Court of Appeals for reconsideration under the standards

of §2 as amended.

CONCLUSION

For the foregoing reasons, this Court should issue the writ of certiorari, and (1) summarily reverse the opinion and judgment below, (2) vacate and remand for further consideration of Petitioners' claim under §2, or (3) set the case for argument.

Respectfully submitted,

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[639 F.2d 1383]

JOHN W. CROSS, et al.,

Plaintiffs-Appellants,

v.

LLOYD BAXTER, et al.,

Defendants-Appellees.

No. 80-7246

United States Court of Appeals, Fifth Circuit

Unit B

March 20, 1981

Appeal from the United States District Court for the Middle District of Georgia.

Before JONES, FAY and HENDERSON, Circuit Judges.

FAY, Circuit Judge:

Plaintiff-appellant brought this

action to have the at-large electoral system for selecting city councilmen in Moultrie, Georgia, declared illegal, as violative of the First, Thirteenth, Fourteenth, and Fifteenth Amendments, as well as 42 U.S.C. §§ 1971 and 1973. The District Court, holding for the defendants, dismissed the complaint. For the reasons set out below, we affirm the District Court's judgment.

This is the third in a series of voting dilution cases that we decide today. Rather than repeat the extensive discussion set forth in the first of these cases, Lodge v. Buxton, 639 F.2d 1358 (1981), we incorporate by reference herein the legal principles established in that case.

Appellants assert that, at a minimum, they are entitled to have this case remanded for reconsideration in light of

the Supreme Court's decision in Mobile v. Bolden, 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980). In light of our decision today in Lodge v. Buxton, supra, we conclude that such a remand is unnecessary.

I

We said in Lodge v. Buxton that, in order to maintain a voting dilution action such as this, a plaintiff must establish that the governmental body in question is unresponsive to its legitimate needs. Reduced to its simplest terms, failure to prove unresponsiveness precludes a plaintiff from obtaining relief. In the present case, the District Court concluded that plaintiffs had failed to establish that the Moultrie City Council was unresponsive to the particularized needs of the Black residents of that city. He based that finding on evidence of the following: (1) Black areas of the community have

recreational programs and facilities equal to those in the predominantly White areas; (2) public housing is substantially integrated; (3) the City Council has made "affirmative efforts" to increase voter registration, and has long since desisted from its earlier practice of maintaining segregated voting lists; (4) the jail facilities are not operated on a segregated basis, and law enforcement is administered without regard to race, creed, or color; (5) under the current plan the Black neighborhoods will have more paved streets than the White neighborhoods; and (6) the city has made an "active effort" to remedy any past disparity in the racial composition of its labor force. On the basis of this record, the District Court's finding, that plaintiff had failed to prove unresponsiveness by Moultrie city officials, is amply supported and not clearly

erroneous. Accordingly, the judgment of the District Court dismissing plaintiff's complaint must be and is AFFIRMED.

HENDERSON, Circuit Judge, concurring in the result:

I concur in the result reached by the majority, but for the reasons set forth in my dissent in Lodge v. Buxton, 639 F.2d 1358 (5th Cir. 1981) decided today, I must respectfully disagree with the legal principles leading to that conclusion.

The district court order was entered prior to the Supreme Court's decision in City of Mobile v. Bolden, 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed. 47 (1980). Consequently, the district judge did not have the benefit of the Mobile opinion but was bound by the mandate of Cross v. Baxter, 604 F.2d 875 (5th Cir. 1979). On remand, he conducted another hearing

in which he evaluated the plaintiff's evidence of unresponsiveness and found it to be lacking. The majority, reaffirming the viability of this Zimmer factor, upholds the district judge's finding. While I agree with the majority that the district court's findings of fact are not clearly erroneous, I am also of the opinion that the evidence does not measure up to the Mobile standard for the maintenance of a voting dilution case. For this reason, I believe that the judgment of the district court should be affirmed.

[688 F.2d 279]

JOHN W. CROSS, et al.,
Plaintiffs-Appellants,

v.

LLOYD BAXTER, et al.,
Defendants-Appellees.

No. 80-7246

UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT.*

Unit B

Sept. 20, 1982

Appeal from the United States District Court for the Middle District of Georgia.

Before JONES, FAY, and HENDERSON, Circuit Judges.

PER CURIAM:

Under date of March 20, 1981 we issued our opinion in this matter, 5th

*Former Fifth Circuit case, Section 9(1) Public Law 96-452 October 14, 1980.

Cir., 639 F.2d 1383. Because both the majority and concurring opinions discuss the question of "unresponsiveness" by the public body in question, we supplement our holding by taking specific note of the language in footnote 9 of the recent case of Rogers v. Lodge, ___ U.S. ___, 102 S.Ct. 3272, 73 L.Ed.2d 1012 (1982) wherein the United States Supreme Court states:

> The Court of Appeals held that "proof of unresponsiveness by the public body in question to the group claiming injury" is an essential element of a claim of voting dilution under the Fourteenth Amendment. 639 F.2d, at 1375. Under our cases, however, unresponsiveness is an important element but only one of a number of circumstances a court should consider in determining whether discriminatory purpose may be inferred.

In a further effort to clarify our holding, we point out that this matter was tried subsequent to a remand from our court and in accordance with that

opinion, 604 F.2d 875 (5th Cir. 1979). Thereafter, the trial court made extensive findings of fact and conclusions of law. We find these findings of fact to be not clearly erroneous. The trial court's conclusions of law were based upon the mandate set forth above and the authorities cited therein including Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973) (en banc), aff'd on other grounds sub nom. East Carroll Parish School Board v. Marshall, 424 U.S. 636, 96 S.Ct. 1083, 47 L.Ed.2d 296 (1976). The trial court did not have the benefit of the Supreme Court's decisions in City of Mobile v. Bolden, 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed. 47 (1980) nor Rogers v. Lodge; however, a review of these conclusions refects that the plaintiff's case falls short under any yardstick.

The judgment is AFFIRMED.

All pending motions are DENIED.

IN THE UNITED STATES COURT
OF APPEALS FOR THE
ELEVENTH CIRCUIT

No. 80-7246

JOHN W. CROSS, et al.,

Plaintiffs-Appellants,

v.

LLOYD BAXTER, et al.,

Defendants-Appellees.

- - - - - - - - - - - - -

Appeal from the United States
District Court for the Middle
District of Georgia

- - - - - - - - - - - - -

Before JONES, FAY and HENDERSON, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the motion of appellants for leave to file rehearing out of time is GRANTED,

IT IS FURTHER ORDERED that appellants' alternative extraordinary motion for rehearing is DENIED.

IN THE UNITED STATES COURT
OF APPEALS FOR THE
ELEVENTH CIRCUIT

No. 80-7246

JOHN W. CROSS, et al.,

Plaintiffs-Appellants,

v.

LLOYD BAXTER, et al.,

Defendants-Appellees.

- - - - - - - - - - - - -

Appeal from the United States
District Court for the Middle
District of Georgia

- - - - - - - - - - - - -

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion October 21, 1980, 11th Cir., 198_, ___ F.2d ___).

(November 12, 1982)

Before JONES, FAY, and HENDERSON, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

S/PETER FAY
United States Circuit Judge

[604 F.2d 875]

JOHN W. CROSS, et al.,
Plaintiffs-Appellants,

v.

LLOYD BAXTER, et al.,
Defendants-Appellees.

No. 77-3286

United States Court of
Appeals, Fifth Circuit

Oct. 16, 1979

Appeal from the United States District Court for the Middle District of Georgia.

Before TUTTLE, GODBOLD and RUBIN, Circuit Judges.

GODBOLD, Circuit Judge:

Members of the Moultrie (Georgia) City Council are elected to staggered terms from the town at-large by a

plurality of votes cast.[1] Plaintiffs, black residents of Moultrie, allege that use of the at-large multimember district[2] rather than single-member districts unconstitutionally dilutes their votes and the votes of all back citizens in Moultrie, who make up about 35% of the city's population. The district court held that plaintiffs had failed in their burden of proving dilution and dismissed. We reverse and remand.

[1,2] An appointment plan is not constitutionally infirm merely because

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1. Moultrie had a majority vote requirement and run-off elections until 1977 when a three-judge district court enjoined their further use.

2. We need not for purposes of this opinion draw any distinctions between "at-large" and "multimember" districts. See generally Corder v. Kirksey, 585 F.2d 708, 713 n.11 (CA5, 1978).

it includes multimember or at-large districts. The burden is on the plaintiff to prove that such an electoral scheme unconstitutionally dilutes the votes of minority group members. See White v. Regester, 412 U.S. 755, 765-66, 93 S.Ct. 2332, 2339, 37 L.Ed.2d 314, 324 (1973); Zimmer v. McKeithen, 485 F.2d 1297, 1304-05 (CA5, 1973) (en banc), aff'd on other grounds sub nom. East Carroll Parish School Board v. Marshall, 424 U.S. 636, 96 S.Ct. 1083, 47 L.Ed.2d 296 (1976). In a number of cases this court has explained the content of the plaintiff's burden of proving dilution of a minority's votes. We have indicated that four specific areas of inquiry are particularly important: (1) equality of access of minority group members to the political process; (2) whether past discrimination has the present effect of discouraging

minority members' participation in the electoral process;[3] (3) whether the governmental policy underlying the use of multimember districts is tenuous; and (4) the responsiveness of the government body in question to the needs of the minority community. See, e.g., Corder v. Kirksey, 585 F.2d 708, 712 n.8 (CA5 , 1978); Nevett v. Sides, 571 F.2d 209, 217 (CA5, 1978), petition for cert. filed, 47

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3. The first area of inquiry, equal access to the election process, entails investigation into whether blacks now have an opportunity to fully participate in all phases of the electoral process--nomination, campaigning, and voting. The second area of inquiry, the effects of past discrimination, entails determining whether, although past barriers to participation such as the poll tax or white primary no longer exist, the residual effect of past discrimination is that blacks in fact continue to participate proportionately less than whites (by registering to vote in low number, for example). See Kirksey v. Board of Education, 554 F.2d 139, 145 n.13 (CA5) (en banc), cert. denied, 434 U.S. 968, 98 S.Ct. 512, 54 L.Ed.2d 454 (1977).

U.S.L.W. 3247 (Sept. 22, 1978) (No. 78-492); Kirksey v. Board of Supervisors, 554 F.2d 139, 143 (CA5) (en banc), cert. denied, 434 U.S. 968, 98 S.Ct. 512, 54 L.Ed.2d 454 (1977); Zimmer, 485 F.2d at 1305.

The purpose of inquiry into these areas is to determine whether an electoral system that is unobjectionable in the abstract, nevertheless, on the specific facts presented, has the effect of diluting the impact of a minority's voting power, and whether it is intended to have such an effect. See Nevett v. Sides, 571 F.2d at 221-25[4]. These four

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4. Nevett v. Sides settled in this circuit that invidious discriminatory intent is required in voting dilution cases based on the Fourteenth and Fifteenth amendments. This issue is pending before the Supreme Court. See Bolden v. City of Mobile, 571 F.2d 238 (CA5, 1978) prob. jur. noted, 436 U.S. 902. 98 S.Ct. 2229, 56 L.Ed.2d 399 (1978), scheduled for reargument next term, ___ U.S. ___, 99 S.Ct. 2048, 60 L.Ed.2d 658 (1979). On remand the district court should address itself to the question of intent.

areas of inquiry are not exclusive, and a plaintiff need not prove that all four inquiries produce results tending to show unconstitutional discrimination. Id. at 224; Zimmer, 485 F.2d at 1305.[5] The district court correctly identified the relevant primary areas of inquiry, but, for the reasons that we now discuss, its decision cannot stand.

I. Adequacy of findings of fact

[3] F.R.C.P. 52(a) requires the district court to make findings of fact and conclusions of law in deciding all cases tried without a jury, and these must

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5. This court has also identified a number of "enhancing" factors that, if present, strengthen the plaintiff's case. These include the use of a majority vote requirement, an anti-single shot voting provision, lack of a geographic subdistrict requirement, and the existence of large districts. See Nevett, 571 F.2d at 223; Zimmer, 485 F.2d at 1305.

be sufficiently detailed that the court of appeals can ascertain the factual and legal basis for the district court's ultimate conclusion. See, e.g., Hydrospace Challenger, Inc. v. Tracor/MAS, Inc., 520 F.2d 1030, 1034 (CA5, 1975). Because the resolution of a voting dilution claim requires close analysis of unusually complex factual patterns, see Corder v. Kirksey, 585 F.2d at 712-13, and because the decision of such a case has the potential for serious interference with state functions, see Hendrix v. Joseph, 559 F.2d 1265, 1271 (CA5, 1977), we have strictly adhered to the rule 52(a) requirements in voting dilution cases and have required district courts to explain with particularity their reasoning and the subsidiary factual conclusions underlying their reasoning. "[C]onclusory findings as to each of the Zimmer criteria are no more helpful than an overall

conclusory finding of dilution. The factual predicates for such conclusions must be clearly stated by the trial court." David v. Garrison, 553 F.2d 923, 929 (CA5, 1977).[6] Perhaps in no other area of the law is as much specificity in reasoning and fact finding required, as shown by our frequent remands of voting dilution cases to district courts. See, e.g., Corder v. Kirksey, supra; Blacks United for Lasting Leadership, Inc. v. City of Shreveport, 571 F.2d 248 (CA5, 1978); Hendrix v. Joseph, supra; David v. Garrison, supra; Nevett v. Sides, 533 F.2d 1361 (CA5, 1976). As a general rule,

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6. See Corder v. Kirksey, 585 F.2d at 713: "Given the intensely factual nature of voting dilution cases, we, as an appellate court, can but speculate whether the law was properly applied if we lack sufficiently explicative findings."

if the district court reaches a conclusion on one of the Zimmer inquiries without discussing substantial relevant contrary evidence, the requirements of rule 52 have not been met and a remand may be called for if the court's conclusions on the other Zimmer inquiries are not sufficient to support a judgment.

II. District court's evaluation of the evidence

The district court held that the political process in Moultrie is equally open to participation by blacks, that past discrimination does not preclude present effective participation by blacks in Moultrie's electoral system, that the Moultrie city government is "not unresponsive" to the needs of the black community, and that the policy underlying Moultrie's choice of at-large elections was not one of racial discrimination. We examine

each of these areas to see whether the court made full nonconclusory findings of fact and conclusions of law and used correct legal standards in evaluating the evidence.

A. Denial of access to the electoral process

A key issue in a voting dilution case is whether the minority group of which the plaintiff is a member is denied equal access to the various phases of the political process, including nomination, campaigning, voter registration, and voting. If lack of minority input into the electoral process can be demonstrated then the plaintiff has gone far toward proving that the at-large electoral system has the effect of diluting minority votes. A denial of equal access may take any of several forms, ranging from such direct governmentally-sanctioned exclusions as the poll tax or the white primary, to the

existence of a private slating organization that uses racist tactics and does not seek minority votes (as in White v. Regester, supra), to less concrete but no less effective barriers to participation such as cultural and language differences between the majority and minority, see White v. Regester, 412 U.S. at 768, 93 S.Ct. at 2340, 37 L.Ed.2d at 325, or a disproportion between the levels of education, income, employment, and living conditions of the majority and minority. See Kirksey, 554 F.2d at 144 & 145.

The district court found no current legal barriers (that is, barriers imposed by law) to full black participation in the Moultrie electoral process. The white primary was abolished in Georgia over 30 years ago, and blacks are currently allowed to register and vote in all elections. Elections in Moultrie are non-partisan, and a person who wishes

to run for office in Moultrie need only file an intention to run and pay a filing fee in order to be placed on the ballot. The district court found affirmative evidence of blacks' equal access to the Moultrie political process in the recent election of a black candidate to the City Council[7] and in the fact that other, but unsuccessful, black candidates apparently had received some white votes. The court concluded that the plaintiffs had failed to prove that Moultrie political process was not equally open to participation by blacks.[8]

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7. This candidate, Frank Wilson, was the first black elected to the City Council in the history of the city. Since this appeal was filed, Wilson was defeated for reelection by another black man. No other seats on the City Council have been won by blacks.

8. The district court also held that blacks and whites in Moultrie do not "vote strictly along color lines," and gave examples of black candidates who had FOOTNOTE CONTINUED NEXT PAGE...

[4] The district court's conclusion of no denial of access cannot stand, first because the court did not make findings concerning evidence tending to show that official discrimination that deters political participation political participation by blacks has not yet

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FOOTNOTE CONTINUED. . .received some white votes. The district court viewed this as evidence that blacks do have some success in campaigning for office. This is perhaps evidence that blacks have some access to the political process, although it alone could not support a finding of equal access.

Evidence of racial polarization in voting has been held to be a prerequisite in a voting dilution challenge. See Nevett, 571 F.2d at 223 & n.16, citing United Jewish Organization v. Carey, 430 U.S. 144, 166 n.24, 97 S.Ct. 996, 1010, 51 L.Ed.2d 229, 246 (1977). If race plays no part in voters' choices, there is no injury to blacks as a group caused by the use of multimember districts. See Comment, Constitutional Challenges to Gerrymanders, 45 U.Chi.L Rev. 845, 856 (1978). It does not appear that the district court intended to find that there is such an absence of racial bloc voting in Moultrie that a finding of dilution is foreclosed, however. Such a finding on FOOTNOTE CONTINUED NEXT PAGE. . .

ended in Moultrie. Plaintiffs introduced evidence that the all-white Lions Club supervises Moultrie City Council elections. They put in other evidence that after substantial numbers of blacks had begun to register and vote the City moved a poling place from a location convenient to residents of black neighborhoods to a less convenient location farther away. Under the rule 52(a) standard, as strictly applied in voting dilution cases, this seemingly relevant contrary evidence was required to be discussed and considered.

[5,6] Moreover, the inquiry into equality of access should not come to a

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FOOTNOTE CONTINUED. . .this record would be clearly erroneous. See Nevett, 571 F.2d at 223 n.18. No black candidate has ever received even a plurality of white votes and Wilson, the first black elected to the Council appears to have received as little as 5% of white votes.

halt simply because the evidence shows that there are no longer any barrier imposed by law to minority access. Non-legal barriers may also preclude full black participation in the political process,[9] and plaintiffs introduced sub-

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9. Since our opinion in Nevett, the Zimmer criteria are required to do double duty--they must show that the effect of the multimember system is to dilute minority voting power and they must show discriminatory intent in the institution or continuation of this electoral system. Some facts unearthed in the course of the Zimmer inquiries will more readily support an inference of intent than others. For example, proof of a current governmentally-sanctioned barrier to minority access to the political process (official discouragement of black voter registration, for example) would be strong evidence, standing alone, of invidious discriminatory intent. On the other hand, proof of current socioeconomic barriers to black participation would not, standing alone, support an inference of invidious intent, see Blacks United for Lasting Leadership, Inc. v. City of Shreveport, 571 F.2d 248, 253 & n.5 (CA5, 1978), although such evidence of non-government sanctioned denial of access could support an inference of invidious intent if coupled with evidence of unresponsiveness of elected officials to minority needs. See Nevett, 571 F.2d
FOOTNOTE CONTINUED NEXT PAGE. . .

stantial evidence, not discussed by the district court, tending to show the existence of such non-legal barriers: evidence that black candidates had encountered difficulties in campaigning in white neighborhoods and evidence that housing conditions, employment rates, income, and educational levels are considerably less advantageous for Moultrie blacks than for Moultrie whites. As we held in Kirksey, evidence of socioeconomic inequities gives rise to a presumption that the disadvantaged minority group does not enjoy access to the political process on an equal basis with the majority. "Inequality of access is an

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FOOTNOTE CONTINUED. . .at 223 & n.5. The dual goals of the sensitive Zimmer factual inquiry make it imperative that the district court carefully and precisely state its findings of fact and the legal conclusions it draws from those facts.

inference which flows from the existence of economic and educational inequalities." Kirksey, 554 F.2d at 145. This substantial evidence tending to show inequality of access must be considered and the Kirksey presumption applied to it.

B. Effect of past discrimination on present participation in political process

[7] We have recognized that past policies of racial discrimination may have present impact upon the participation of the minority in the political process. The mere removal of past official discrimination does not render the present effects of that discrimination irrelevant in determining whether an electoral scheme dilutes the votes of the minority. See Kirksey, 554 F.2d at 145-46; Zimmer, 485 F.2d at 1306.

In Moultrie 44.6% of the whites and 26.9% of the blacks are registered to

vote. The number of black members on the City Council historically has been grossly disproportionate to the percentage of blacks in Moultrie's population, with only two blacks elected in the history of the town. According to the record only one black sits on the six-member Council (a mayor and five Council members), although about 35% of the citizens of Moultrie are black. Plaintiffs introduced much evidence of recent and pervasive discrimination. The record contains evidence that literacy tests were used in Moultrie until the mid-sixties, that voting and registration were carried out on a segregated basis until the early sixties, that Moultrie schools were fully desegregated only in 1970, and that public recreational facilities were segregated by law until 1968 or 1969.

[8] Since until the past decade there had been de jure discrimination in

many facets of Moultrie government, including voting for public office, the inference is strong that the disproportions in voter registration and elected officials are at least in part a result of the past pervasive discrimination in Moultrie. The district court found that there was no evidence supporting such an inference and concluded instead that it is equally likely that the reason for the disproportion in voter registration is that the "leaders in the black community" have failed "to ignite the patriotic fervor of their brothers." This misallocated the burden of proof on the issue of present effects of past discrimination. Once plaintiffs have demonstrated a history of pervasive discrimination and a present disproportion in voting registration and election of minority representatives, they have

carried their burden of proving that the past discrimination has present effects. See, e.g., Hendrix v. Joseph, 559 F.2d at 1270; Kirksey, 554 F.2d at 144 & 146; Bradas v. Rapides Parish Police Jury, 508 508 F.2d 1109 1112 (CA5, 1975); Zimmer, 485 F.2d at 1306. The defendants must then come forward with rebutting evidence proving that current disproportions are not an effect of the past. Kirksey, 554 F.2d at 144-46. Without a factual basis in the record a court may not simply atribute present disproportions to lack of interest or apathy on the part of blacks. Id. at 145. Defendants concede on appeal that the district court misplaced the burden of proof but contend that they introduced sufficient edivence to carry their burden of rebuttal. This is a matter to be addressed to the district court on remand.

C. Responsiveness to minority needs

[9] The district court in a voting dilution case must consider whether the plaintiffs have proved that elected officials are unresponsive to minority needs. If so, then the plaintiffs have made a strong case that the challenged electoral scheme has had the effect of depriving minority members of equal representation, see Wallace v. House, 515 F.2d 619, 622-24 (CA5, 1975) vacated on other grounds, 425 U.S. 947, 96 S.Ct. 1721, 48 L.Ed.2d 191 (1976), and such a showing of unresponsive "is strongly corroborative of an intentional exploitation of the electorate's bias." Nevett v. Sides, 571 F.2d at 223.

[10] The district court held that plaintiffs had not proved Council members' unresponsiveness to the needs of the black community. The evidence introduced that pertained to the Council's

responsiveness fell into two categories: (1) the provision of governmental services to the minority community and (2) the distribution of municipal jobs and appointments to various city boards.[10]

With respect to most community services provided by the City (e.g., sewage, policy protection, fire protection, garbage collection), the district court found that no evidence had been introduced showing unresponsiveness.[11] The

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10. Plaintiffs also introduced evidence that individual Council members and former Council members belong to racially segregated clubs and churches. Such evidence of personal actions is not relevant in determining whether an official act was undertakne with invidious discriminatory intent. See Palmer v. Thompson, 403 U.S. 217, 91 S.Ct. 1940, 29 L.Ed.2d 438 (1971).

11. Appellants argue that the district court's finding of responsiveness in police protection was clearly erroneous because one witness testified that the city jail was operated on a segregated basis until 1975 and there was some testimony of discriminatory enforcement of the law by the police department during the FOOTNOTE CONTINUED FOLLOWING PAGE. . .

district court cited specific instances of the Council's acting favorably on requests for action by black citizens. The court found that there are more unpaved streets in black neighborhoods than white but discounted this as evidence of current unresponsiveness because more funds are now spent on street improvement in black neighborhoods than in white neighborhoods. The court held plaintiffs' evidence that city schools were desegregated only in 1970, that jury lists in county courts contain disproportionately low numbers of blacks, that housing patterns in Moultrie remain segregated, and that blacks are underrepresented in the county government, was irre-

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FOOTNOTED CONTINUED...mid-sixties. Since we are remanding the case there is no need to decide whether the district court's decision on this factual matter was clearly erroneous.

levant because the City Council has no responsibility for these matters and no power to remedy them.

The district court also found no evidence of unresponsiveness in the City's employment practices, though only between 24% and 30% of the City's employees are black (as compared to a 35% black general population) and a greater disparity exists in supervisory level City jobs. The court found this evidence did not show unresponsivenss because the City had engaged in an affirmative action hiring plan and because the City's employment advertisements contain the phrase "equal opportunity employer." The court concluded that the racial disparity in the makeup of the City's work force was not attributable to a lack of responsiveness on the part of the City but to "the apparent lack of interest on the part of blacks in

applying for city jobs." The court also found affirmative evidence of Council responsiveness in the fact that some blacks had been appointed to city boards and declined to infer any lack of responsiveness from the Council's decision to allow vacancies on the Council to remain unfilled until the next election rather than appointing blacks to serve out the unexpired terms.

Finally, relying on the testimony of present Council members and past solicitation of black votes by white Council members, the district court found that the Council is more responsive to black needs and concerns under the present at-large system than it would be if single-member districts were used, because a single-member district systme "would eliminate any political incentive for the other [white] members of the Council to give active consideration to black concerns

because they would be representing only a white constituency."

[11] The district court's conclusion that the plaintiffs failed to prove unresponsiveness must be set aside for several reasons. First, as explained in Kirksey, once plaintiffs have demonstrated recent pervasive official unresponsiveness to minority needs,[12] the burden shifts to the defendants to demonstrate that the unresponsiveness of the past is no longer indicative of present governmental unresponsiveness. Kirksey, 554 F.2d at 144-46.[13]

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12. A present white member of the Council testified that prior to his election in 1972 the Council had neglected the needs of the black community.

13. The district court is, of course, entitled to consider whether past examples of unresponsiveness are so far distant in time "to permit an inference that what was true in the past is no longer true." Kirksey, 554 F.2d at 144.

[12] Second, several items of evidence not discussed by the district court must be considered pursuant to Rule 52(a). Plaintiffs introduced uncontradicted testimony that recreational facilities in the black areas of town are inferior to those in white areas.[14] They introduced evidence that public housing projects were constructed in the 1950's that were segregated by law when built and that remain largely segregated today. Though there is no evidence that de jure segregation remains today in Moultrie public housing, if a high degree of de

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14. The court did discuss one incident in which a request for improvements in the condition of a swimming pool in a black community had been complied with by the Council. The district court properly found this to be affirmative evidence of responsiveness, but it must be considered along with countervailing evidence of nonresponsiveness with regard to recreational facilities.

facto segregation continues today and is traceable to past intentional discrimination by the Council,[15] it would be evidence of current unresponsiveness. As we have noted before, the Supreme Court has used this approach in other areas of desegregation. See Kirksey, 554 F.2d at 145, n. 12, citing Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 26, 19 S.Ct. 1267, 1281, 28 L.Ed.2d 554, 572 (1972) (burden on school district to justify plan containing racially imbalanced schools, where school district has history of past intentional segregation). Appellants go further and argue if any racial inequality exists in the town that the Council has failed to

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15. It is not clear from the record before us what degree of control the City Council now has, or had in the fifties and since, over public housing.

remedy, a finding of unresponsiveness is compelled. This is unsound. Where the racial discrimination in question was not caused by the acts of the local governmental body involved, the body is not necessarily unresponsive to minority needs merely because, with its limited resources, it has not attempted to remedy every existing inequality.

[13] There is other evidence, some of it temporally remoted, that arguably demonstrated Council unresponsiveness and must be considered: e.g., segregated voter lists, the City's delay in complying with the requirements of §5 of the Voting Rights Act of 1965, operation of racially segregated jails, and racially selective enforcement of laws by City police.[16]

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16. It is possible that the segregated private housing patterns in Moultrie are also attributable to past intentional discrimination by the City. The district
FOOTNOTE CONTINUED FOLLOWING PAGE. . .

The district court should also further address itself to whether the Council's expenditures for paving in black neighborhoods show unresponsiveness. The court did not consider the disproportionately large number of unpaved streets in black areas as indicative of unresponsiveness because at present more is spent on street improvements in the black community than in the white. That current expenditures are greater in black neighborhoods does not necessarily show responsiveness.[17]

FOOTNOTE CONTINUED...court found that they were not, but this finding was not adequately supported by subsidiary findings of fact. On remand the district court should address this question again.

17. For example, if 95% of the need for street improvements is for streets in the black community, allocating only 60% of street improvement funds for work in black areas would be evidence of unresponsiveness, not responsiveness.

[14] Finally, the conclusion that plaintiffs had failed to prove unresponsiveness cannot stand because the court relied in part on a finding that Council members would be less responsive to black concerns if elected from single-member districts than they are under the existing at-large system. Comparisons of various electoral configurations in order to ascertain which alternative most fairly assures responsiveness to black concerns and best ensures black access to the political system is appropriate when choosing the appropriate remedy for an unconstitutional electoral system. See e.g., U.S. v. Board of Supervisors, 571 F.2d 951, 956 (CA5, 1978). However, when considering whether an existing system is unconstitutional such comparisons are not called for—the crucial question is whether government officials at present

are, or are not, unresponsive to black needs.

[15] One argument advanced by plaintiffs on appeal is patently without merit and need not be considered by the district court on remand. Plaintiffs argue that any action taken by Council members out of concern for their "mere political self-interest, i.e., soliciting votes" cannot be considered responsive to the needs of the black community. It is characteristic of representative democracy that elected officials are sensitive to the concerns of the voters at least in part because they want to receive votes when they run for reelection.

Plaintiffs also argue that the district court erred in not considering the disparity in the city's hiring to be prima facie evidence of unresponsiveness that must be rebutted by the city. Cases

cited in support of this proposition involve the burden of proof in Title VII employment cases. Since a mere statistical disparity generally cannot establish a constitutional violation in constitutional cases, see Washington v. Davis, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976), we are not convinced that the wholesale importation of Title VII principles into voting rights cases based on the Fourteenth and Fifteenth Amendments is appropriate. It is particularly difficult to see how a bare statistical disparity shows a lack of responsiveness where there is a finding that the governmental body is attempting to remedy the disparity by use of an affirmative action plan. Since the case is to be remanded, however, it would be appropriate for the district court to spell out the precise content of the city's current willingness to hire without regard

to race. If this is the extent of the plan and the current statistical disproportion is attributable to past intentional discrimination by the city, an affirmative action plan calculated to do away with the disparity may be required in order to rebut an inference of unresponsiveness.

D. State policy

[16] The district court found that there was no state policy favoring either single-member or multimember districting and that many Georgia municipalities use multimember districting. The court noted that the at-large scheme had been instituted in Moultrie in 1859 when no blacks voted so that no inference could be made of racially discriminatory motivation in institution the scheme. The district court thus properly placed no weight on this factor. The purpose of the Zimmer state policy inquiry is to

decide whether an inference can be drawn that the use of multimember districts is rooted in racially discriminatory motives; the reason for inclusion of "tenuous state policy" in the Zimmer listing is that a state policy in favor of at-large districts that is shown to be "tenuous" is evidentiary of invidious intent. See Nevett v. Sides, 571 F.2d at 224; Zimmer, 485 F.2d at 1307 (state policy said "tenuous" where long tradition against at-large districts reversed shortly after large numbers of blacks began to vote). Where the circumstances will not support an inference of invidious motivation either in the institution or continuation of the at-large system, the absence of a state-wide policy favoring at-large districting is not in itself evidence of dilution.

III. Other issues

[17] The district court's conclusion that the aggregate of the Zimmer criteria does not show dilution of the black minority's voting power in Moultrie City Council elections obviously must be reconsidered, since we have set aside the findings on three of the four criteria. Extended discussion of other errors asserted by the plaintiffs is not necessary. Brief discussion of one claim of error may be useful to the district court on remand, however. The plaintiffs contend that the district court erroneously held that the election of a single black official forecloses any possible dilution claims, and arguably the last sentence of the district court's opinion can be so read. Just as the election of disproportionately few minority members does not necessarily

mean that the minority vote is diluted, see Zimmer, 485 F.2d at 1305, the election of a single black official does not mean that the black vote is necessarily not diluted. See Kirksey, 554 F.2d at 149 n.21.

REVERSED and REMANDED.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
THOMASVILLE DIVISION

JOHN W. CROSS, et al.,

Plaintiffs

v.

LLOYD BAXTER, et al.,

Defendants.

CIVIL ACTION NO. 76-20-THOM

[October 26, 1977]

O P I N I O N

The Plaintiffs in this case are three black citizens who are registered voters in the City of Moultrie, Georgia. The Defendants in the case are the Mayor, the members of the City Council and the superintendents and managers of elections in Moultrie.

As originally filed this class action presented certain issues which required the convening of a three judge court, but all of those issues have been heretofore disposed of to the satisfaction of all concerned and there remains for consideration only the contention of the Plaintiffs that the system of electing the members of the City Council in Moultrie has the effect of diluting the relative strength of black voters in the City in violation of constitutional requirements.

The Moultrie City council consists of a Mayor and five Council members who are elected on an at-large voting basis to staggered terms by a plurality of votes cast. There is no majority vote requirement. The prayer of the Plaintiffs' complaint is that this Court order the Defendants to cease using the at-large voting system and establish a single mem-

ber district plan of election.

In a voting dilution case such as this the Plaintiffs have the burden of showing that their group has been denied access to the political process equal to the access of other groups, and in a number of cases, the most recent of which are David v. Garrison, 553 F.2d 923 (decided June 10, 1977), and Hendrex v. Joseph, No. 76-1725 in the Court of Appeals (decided September 12, 1977), the Fifth Circuit Court of Appeals has set out the standards that control such cases in this Circuit and has indicated that the correct approach to a claim of dilution is to examine the situation in light of certain specific factors, these factors being: minority access to the election process, including the slating process; responsiveness of the elected body in providing governmental services to minority com-

munities; whether there is a state policy which favors one system in preference to another; whether past discrimination which may have existed precludes present effective participation by minority groups; and finally, a consideration of the aggregate of all factors. The Court will deal with these factors in the order listed.

Access to the Political Process

According to the 1970 census of population the population of Moultrie is 14,302 persons, of whom 9,319 (65.2%) are white and 4,975 (34.8%) are black. This is not a large district in the context of Georgia elections. The total number of registered voters in the city is 5,550 of whom 4,163 (75.7%) are white and 1,337 (24.3%) are black. It is thus obvious that blacks have not registered to vote in proportion to the black population, but

there is no evidence that this failure of blacks to register is brought about by any impediment to their freedom to do so. The "Democratic White Primary" in Georgia was abolished more than thirty years ago and black have registered and voted in all primaries and general elections since that time. There has also been no lack of access to the process of slating candidates for office in the City of Moultrie. There are no screening organizations, petition requirements or other barriers to discourage minority candidates. The perfunctory process of qualifying as a candidates is the same for blacks as for whites and a number of blacks have qualified as candidates in municipal elections in Moultrie in recent years and have actively campaigned without difficulty. Indeed, Frank Wilson, one of the Plaintiffs in this case, was a candidate for election to the Moultrie City Council earlier this

year and was elected and is now serving as a member of that body. Since this suit was brought against the members of the Council Wilson is now in the unique position of being Plaintiff and Defendant.

The Plaintiffs have contended that blacks and whites vote strictly along color lines and that this has the practical effect of excluding them from the election process, but the evidence does not support this contention. In the election for City Council held in May, 1976 Sherrod McCall, a white, received 1,382 votes, and Marion Graham, a black, received 865 votes. 2,284 persons voted in that election and of these 481 were blacks. It is, therefore, apparent that Graham received almost as many white votes as black votes, even if it is assumed that he received all of the black votes, and there is no basis for that assumption. Amos Ryce, a black, was a candidate for

the City Council in 1969 and he got about 800 votes and by his own estimate approximately 25% of the votes which he received were votes which were cast by whites. In the 1977 election 2,054 persons voted, of whom 540 were blacks. Frank Wilson, the successful black candidate, received 628 votes, so of necessity must have received a significant number of white votes.

While the evidence shows that the blacks in the community have not held seats on the City Council in proportion to their voting potential, this does not justify a conclusion that the political process, including registering, voting and slating candidates, was not equally open to participation by them.

Responsiveness

The Plaintiffs complain that the City Council has been unresponsive to the legitimate complaints and needs of the black

community. An analysis of the responsiveness question requires consideration of two distinct problems. The first is the provision of governmental services to minority communities.

The City of Moultrie provides the following community services for its citizens: police protection, fire protection, garbage collection, water, sewage, drainage, street maintenance, electricity, natural gas, recreational facilities, health services (mosquito control, dog catcher, etc.) and civil defense. With regard to police protection, fire protection, garbage collection, water, sewage, drainage, electricity, natural gas, health services and civil defense, there is no evidence whatever in the record indicating that the City government has been unresponsive to the needs of the black community. As respects street maintenance the evi-

dence shows that there are more unpaved streets in that part of the city principally occupied by blacks than in that part of the city principally occupied by whites, and that this has been a legitimate basis of complaint, but the evidence also shows that substantial strides have been made in recent years in correcting this imbalance and that more funds are now being spent on street improvements in the black community than in the white community.

With regard to recreation facilities, one of the Plaintiffs, Jerry Denegall, complained to the City Council about the condition of a municipal swimming pool in the black community and requested certain improvements and he himself testified that the improvements which were requested were made and that he later complimented the City Councilmen on helping him bring it about.

As to general responsiveness, Amos Ryce, a witness who was subpoenaed by the Plaintiffs who is a black minister and Executive Director of two housing projects, testified that in 1971 he wished to develop an apartment complex for the housing of residents in the black community and when he acquainted the City Council with his plans and desires the City sold him some land which the City owned which he used for this purpose and thereafter made all of the utilities available to him and he affirmed that he received complete cooperation from the Mayor and the Council in the handling of the project, the following question and answer concluding his testimony:

> Q. Do you feel the Mayor and Council have been responsive to you?
>
> A. Very much so.

Some of the "unresponsiveness" referred to by the Plaintiffs and some of

their witnesses during the course of their testimony had to do with matters over which the Defendants neither have had nor now have any control and concerning which they have not had and do not now have any power to take "corrective action". One of the complaints made by the Plaintiffs is that the schools in the city should have been desegregated sooner, but this is not the business of the City Council. All the schools in the City of Moultrie and throughout Colquitt County are administered by the Colquitt County School Board, which is itself an elected body. Another complaint is that there have not been enough blacks on jury lists in Colquitt County. Here again, the Moultrie City Council has no control whatever over the make-up of the County jury lists. The Plaintiffs also complain of "segregated housing" patterns. It is true that

the majority of blacks in the community live in the northwestern part of the city and the majority of whites live in the southeastern part of the city, but the City Council has not dictated this nor can it dictate a change in the pattern. Another complaint is that blacks do not have adequate representation in the County government of Colquitt County. Since the County Commissioners are elected by the people of the County the City Council of Moultrie has no control over the make-up or the operation of the County government. Some other matters complained of are either under the exclusive jurisdiction of the County government or certain federal agencies.

It has already been noted that there is now one black member of the City Council and the statistics show that for a number of years past the black vote has

affected the outcome of city elections, and this fact has been recognized by both the minority group and candidates for Mayor and Council. The white members of the Council testified that they are aware that because of the significance of the black vote they must be responsive to the black community and this is consistent with the fact that the white candidates actively solicit black votes.

The Plaintiffs have asked that this Court order the establishment of a single member district plan of election on the theory that this would make for more responsiveness from the City government, but it is not clear to the Court that single member districts would enhance the political strength of black voters. There are five members of Council and about 24% of the registered voters are black. A single member districting system would

assure blacks one (and perhaps two, depending on how the lines were drawn) seat on the Council, but this would eliminate any political incentive for the other members of the Council to give active consideration to black concerns because they would be representing only a white constituency. Under the present at-large system every candidate recognizes the existence of a black constitutency and the practical necessity of being responsive to that constituency in order to be elected. Every elector now has the right to vote for all five members of the Council. The system suggested by the Plaintiffs would limit the electors to one vote for one member.

While the adoption of the Plaintiffs' suggested plan would doubtless guarantee that there would always be a black member of City Council, it would in the Court's

view make the other members of the Council less responsive to the interests of the black community. Stated otherwise, to adopt a single member plan would permanently compartmentalize the electorate in the city, reinforce patterns of racial separateness and prevent members of the minority class from ever exercising influence on the political system beyond the bounds of their single member district or districts. They would forever remain a minority in their political influence. A change which would guarantee that a black candidate would be elected would obviously be good for that candidate, but it does not necessarily follow that it would be good for the black community.

The second problem faced in making a responsiveness analysis concerns the distribution of municipal jobs and appointments to various boards. There are appro-

ximately 250 municipal employees in Moultrie. There were introduced in evidence the results of breakdowns of this employment by race which were made on two different occasions during the last eighteen months. One of these analyses showed that something more than 69% of the city employees were white and something more than 30% were black. Another of the analyses made at a different time showed that the make-up was something more than 75% white and something more than 24% black. It is reasonable to deduce from this that on an average the city employees are something more than 72% white and something more than 27% black. This is not sharply disproportionate to the racial composition of the population (65.2% and 34.8%) and is a surprisingly good ratio when consideration is given to the apparent lack of interest on the

part of blacks in applying for city jobs when they are available. The City has adopted an affirmative action plan to increase minority employment and for several years has followed the practice of running newspaper advertisements notifying the public of job openings, inviting applications and stating in the advertisements that the City is "an equal opportunity employer". A sample of these advertisements follows:

CITY OF MOULTRIE
NOW TAKING APPLICATIONS
FOR POSITION OF
☆ BUILDING INSPECTOR
CONTACT the Personnel Department, City Hall to find out if you qualify for this excellent job opportunity.
CITY OF MOULTRIE
Equal Opportunity Employer
4-15-72

HELP WANTED

City Of Moultrie

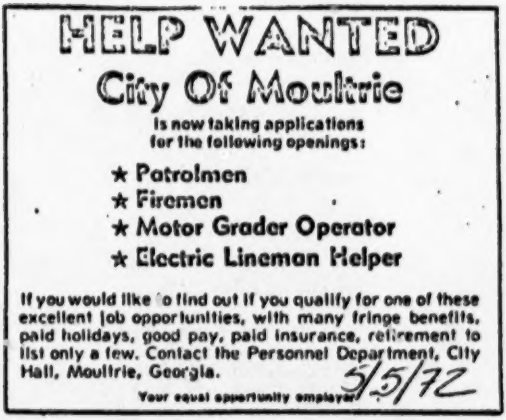
Is now taking applications
for the following openings:

★ Patrolmen
★ Heavy Equipment Operator
★ Diesel & Gas Mechanic

If you would like to find out if you qualify for one of these excellent job opportunities, with many fringe benefits, paid holidays, good pay, paid insurance, retirement to list only a few. Contact the Personnel Department, City Hall, Moultrie, Georgia.

Your equal opportunity employer

4/26/72



HELP WANTED

City Of Moultrie

Is now taking applications
for the following openings:

★ Patrolmen
★ Firemen
★ Motor Grader Operator
★ Electric Lineman Helper

If you would like to find out if you qualify for one of these excellent job opportunities, with many fringe benefits, paid holidays, good pay, paid insurance, retirement to list only a few. Contact the Personnel Department, City Hall, Moultrie, Georgia.

Your equal opportunity employer

5/5/72

CITY OF MOULTRIE
NOW TAKING APPLICATIONS
FOR POSITION OF

☆ POLICE CLERK

CONTACT the Personnel Department, City Hall to find out if you qualify for this excellent job opportunity.

CITY OF MOULTRIE

Equal Opportunity Employer

6-28-72

CITY OF MOULTRIE
NOW TAKING APPLICATIONS
FOR POSITION OF

☆ CASHIER

IMMEDIATE OPENING. Must be able to type 40 words per minute.
CONTACT the Personnel Department, City Hall to find out if you qualify for this excellent job opportunity. 9-23 – 10/72

CITY OF MOULTRIE

Equal Opportunity Employer

CITY OF MOULTRIE
NOW TAKING APPLICATIONS
FOR POSITION OF

☆ MECHANICS

CONTACT the Personnel Department, City Hall to find out if you qualify for this excellent job opportunity.

CITY OF MOULTRIE

Equal Opportunity Employer

9-23 – 9/1/72

CITY OF MOULTRIE
NOW TAKING APPLICATIONS
FOR POSITION OF

☆ FIREMAN
☆ DIESEL MECHANIC
☆ METER MAID

CONTACT the Personnel Department, City Hall to find out if you qualify for this excellent job opportunity.

CITY OF MOULTRIE

Equal Opportunity Employer

9-11-72 – 9-23-72

CITY OF MOULTRIE
NOW TAKING APPLICATIONS
FOR POSITION OF

★ PATROLMEN
★ POLICE CLERK
★ FIREMEN
★ Building Enforcement Officer

CONTACT the Personnel Department, City Hall to find out if you qualify for this excellent job opportunity.

CITY OF MOULTRIE

Equal Opportunity Employer

12-4-72

CITY OF MOULTRIE
NOW TAKING APPLICATIONS
FOR POSITION OF
★ METER READER
CONTACT the Personnel Department, City Hall to find out if you qualify for this excellent job opportunity.
CITY OF MOULTRIE
Equal Opportunity Employer

Jan. 23, 1973

NOW TAKING APPLICATIONS
FOR POSITION OF
★ LABORERS
CONTACT the Personnel Department, City Hall to find out if you qualify for this excellent job opportunity. 3-26-73
CITY OF MOULTRIE
Equal Opportunity Employer

CITY OF MOULTRIE
NOW TAKING APPLICATIONS
FOR POSITION OF
★ MECHANICS
CONTACT the Personnel Department, City Hall to find out if you qualify for this excellent job opportunity. 1-17-73
CITY OF MOULTRIE
Equal Opportunity Employer

CITY OF MOULTRIE
NOW TAKING APPLICATIONS
FOR POSITION OF
★ MECHANICS
★ Utility Meter Reader
(Electricity, Gas, Water)
CONTACT the Personnel Department, City Hall to find out if you qualify for this excellent job opportunity.
CITY OF MOULTRIE
Equal Opportunity Employer

CITY OF MOULTRIE
NOW TAKING APPLICATIONS
FOR POSITION OF
★ LABORERS
★ MECHANICS
★ CERTIFIED WELDERS 3-23-73
CONTACT the Personnel Department, City Hall to find out if you qualify for this excellent job opportunity.
CITY OF MOULTRIE
Equal Opportunity Employer

62—Male Help Wanted

CITY OF MOULTRIE
NOW TAKING APPLICATIONS
FOR POSITION OF
★ POLICE PATROLMAN
CONTACT the Personnel Department, City Hall to find out if you qualify for this excellent job opportunity. 6/25/73
CITY OF MOULTRIE
Equal Opportunity Employer

NOTICE

The City of Moultrie will take applications Thursday at 2:00 P.M. at the Recreation Department Office located on 5th Ave. S.W. for summer help.

All applicants interested in summer employment please be there.

These jobs will be created through a federal grant and family income will be considered.

City Of Moultrie

6/5/73

IMMEDIATE OPENINGS

For Position Of 9-24-73

★ Utility Maintenance Men

Contact the Personnel Department, City Hall to see if you qualify for one of these excellent jobs.

CITY OF MOULTRIE

Equal Opportunity Employer

8-9-73

IMMEDIATE OPENINGS

For Positions Of

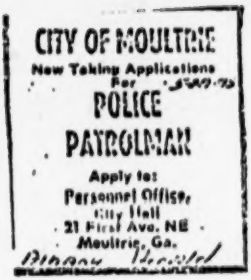
★ Meter Readers

★ Laborers

CONTACT the Personnel Department, City Hall to see if you qualify for one of these excellent jobs.

CITY OF MOULTRIE

Equal Opportunity Employer



CITY OF MOULTRIE

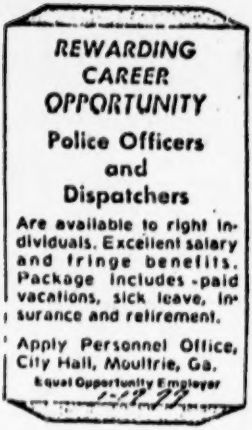
Taking Applications For

☆ POLICE 4-7-75

PATROLMEN

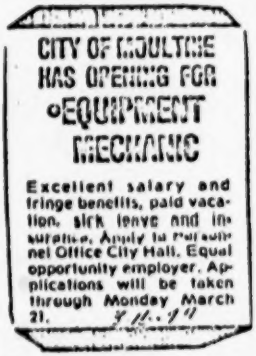
Apply to Personnel Office

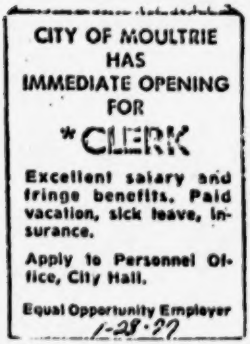
CITY OF MOULTRIE


REWARDING
CAREER
OPPORTUNITY
Police Officers
and
Dispatchers
Are available to right individuals. Excellent salary and fringe benefits. Package includes paid vacations, sick leave, insurance and retirement.
Apply Personnel Office, City Hall, Moultrie, Ga.
Equal Opportunity Employer
1-19-99

REWARDING
CAREER
OPPORTUNITY
Police Officers
and
Dispatchers
1-18-99
Are available to right individuals. Excellent salary and fringe benefits. Package includes paid vacations, sick leave, insurance and retirement.
Apply Personnel Office, City Hall, Moultrie, Ga.
Equal Opportunity Employer

THE 2-25-99
CITY OF MOULTRIE
Is Now Taking
Applications For The
Following Positions
★ 2-Linemen Helpers
★ 1-Water & Sewer
Helper
★ 1-Draftsman
Fringe benefits, paid
vacation, insurance.
Apply
Personnel Office
City Hall
An Equal Opportunity Employer
RAN 6 days
2-25 to 3-3-99


CITY OF MOULTRIE
HAS OPENING FOR
EQUIPMENT
MECHANIC
Excellent salary and fringe benefits, paid vacation, sick leave and insurance. Apply in Personnel Office City Hall. Equal opportunity employer. Applications will be taken through Monday March 21.
3-11-99
RAN 3 days
3-16, 17, 18-1999



The response by blacks to these advertisements has been minimal. Some members of the City Council on occasions have urged some of the Plaintiffs in this case to send black applicants to the City personnel office to apply for available jobs. When these efforts to stimulate interest in job applications have failed to produce results the City has at times run advertisements of the same nature in the newspaper in nearby Albany, Georgia

and the City Manager has notified the officials of Albany State College, where the student body is predominantly black, that job opportunities are available in Moultrie for the graduates of that school. This also has produced minimal results.

The evidence shows that not many blacks hold supervisory or "white collar jobs" with the City and the Plaintiffs emphasize this fact, but there is no evidence that any qualified black has been denied employment for any particular supervisory job nor even that a qualified black has made application for any particular supervisory or "white collar" job.

In the past ten years some blacks have been appointed to some City boards such as the City Planning Commission, Stadium Commission, Housing and Building Board of Adjustments and Appeals, Board of Registrars, Urban Renewal Committee,

Citizens Advisory Committee and Sowega Planning Commission. During the same period no blacks have been appointed to other City boards, such as the Airport Authority, Industrial Development Authority, Moultrie-Colquitt County Development Authority and Moultrie-Colquitt County Library Board.

It is thus clear that blacks as a group have not been "shut out" of consideration for appointment to municipal boards and no evidence was presented which would indicate that any black or blacks had either equal or superior qualifications for appointment to any particular board to which blacks were not appointed.

The Plaintiffs point out that there have been some instances in recent years when vacancies have occurred in the City Council as a result of death or other causes and that blacks have suggested

that a black be appointed to serve the unexpired terms, but that in these instances whites were appointed and the Plaintiffs contend that this is evidence of unresponsiveness. The evidence shows that in June, 1969 L. G. Rowell was appointed to fill a vacancy for an unexpired term after a special election was held for the full term and he was the successful candidate for the full term. The same situation arose in 1973 when Jimmy Reeves was appointed in June, 1973 to fill an unexpired term after he was elected in a special election to the full term. It thus appears that race was not the deciding factor in these appointments, but that the Council did what appears to the Court to have been reasonable in the circumstances, the action assuring continuity and stability in the administration of the City's affairs.

The fact that blacks do not hold supervisory jobs or board memberships in mathematical proportion to the black population does not reflect a lack of governmental responsiveness if the white City employees and board members see to it that the black community receives equal City services, and we have already observed that the black community in Moultrie does receive equal services. City jobs do not necessarily have to be allocated at every employment level in number proportionate to every group in the electorate to show governmental responsiveness. Hiring disparity is relevant at all only if it is shown that the City Council feels that it can treat black citizens unequally with impunity. History has demonstrated that the black vote cannot be ignored in Moultrie and the evidence shows that the members of the City Council are keenly

aware of this fact.

State Policy with Regard to At-Large Districts

In our federal system states can choose those techniques for election officials which suit their local requirements, and it is only in those instances where a plan is unusual or not often used that a suspicion may arise that it is a tool for dilution of the minority vote.

Political subdivisions in Georgia are governed by Acts of local legislation and there is no state policy favoring either at-large districting or single member districting. Many municipalities in the State use the at-large plan and many others use a single member or ward plan. There are no statistics in the record which would enable the Court to determine which plan is more widely used. In any event, in this case there can certainly

be no suspicion that the at-large system was adopted as the result of any racial motivation because this is the system that has been used in Moultrie for 118 years. Since 1859 the Mayor and Council in Moultrie have been elected on an at-large basis and since there was no black vote in 1859 the plan could not have diluted it.

Does Past Discrimination Preclude Present Effective Participation?

The Plaintiffs devoted considerable time and effort in "proving" a matter which required no proof and of which the Court takes judicial notice. That is, that in years past the schools, the hospitals, the jails and all other public facilities in Moultrie and throughout the State of Georgia were operated on a racially segregated basis. However, the white primary went out in the 1940's and

segregation in various public facilities and in schools went out in the 1950's and 1960's. The factual question is whether that past discrimination precludes effective participation by blacks in the electoral system today, and if so whether a change in the system would remedy the situation.

Since we have seen that the slating process is now and has been for a number of years completely open to blacks and that blacks are now and have been for a number of years as free to register to vote as are whites[1] and that blacks are now and have been for a number of years free to vote in all municipal elections in Moultrie, the only piece of evidence which might be regarded as indicating some lingering effect of past discrimination

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1. John Cross, one of the Plaintiffs, testified that he registered as a voter in Moultrie in 1946 and that he could have registered before that date.

is the fact that not as many blacks as whites have registered in proportion to their respective populations and the fact that until recently blacks have not been elected to office.

The statistics show that 44.6% of the whites are registered and 26.9% of the blacks are registered. We can only speculate as to the cause of this difference just as we can only speculate as to the reason why the whites have not registered in greater number. We have already noted that no obstacle has been placed in the way of any citizen. On the contrary, the City government on a number of occasions placed display advertisements in the local newspaper urging registration and voting. Registrars have set up registration facilities in the high school which is attended by both races and have made registration possible on Saturday for the convenience of the working population,

and to further encourage the registration of blacks have appointed John Cross, one of the Plaintiffs in this case, a Deputy Registrar and have designated his place of business in the black community as a place of registration.

Amos Ryce, a black minister who testified for the Plaintiffs, and to whom reference has already been made, moved away from Moultrie a number of years ago and returned to again live in Moultrie in 1968 and he testified that he found that there is no problem "with dialogue" between the races in Moultrie today and that he feels that conditions in Moultrie today are "far different" from what they were in years past. He gave it as his opinion that a black candidate in Moultrie today can get substantial support in the white community, although he doubts that a black candidate could win in a head to head race with a white opponent.

We have already noted that a black has recently been elected to and is now a member of the City Council.

In summary, there is no evidence before the Court which would justify a finding that the election system in Moultrie "suffers from lingering effects of previous racial discrimination". The failure of the blacks in Moultrie to register in large numbers might be attributed to a number of causes and if we are to guess at it we might just as reasonably speculate that the explanation lies in the failure of the leaders in the black community to ignite the patriotic fervor of their brothers.

The Aggregate of the Factors

In this case a federal court is being asked to inject itself into a state-created electoral system and to replace

it with a radically different scheme because of supposed constituional infirmities. Before engaging in such aggressive interference with what has traditionally been regarded as a state function a preponderance of the evidence must demonstrate the infirmities claimed and the Plaintiffs have the burden of making this demonstration. A consideration of all of the evidence in the case causes the Court to conclude that the Plaintiffs have not carried this burden. Indeed, a consideration of the aggregate of the factors hereinabove discussed justifies a determination that this is not a diluted system. This is true because the facts are: (1) Blacks have free access to the political process. (2) The City government is not unresponsive to the needs of the black community. (3) The at-large system is neither unusual nor contrary to state

policy. (4) Past discrimination does not preclude effective participation by blacks in the electoral system today.

Conclusion

In David v. Garrison, supra, the Court stated that in cases of this type if the district is extremely large and a majority vote is required to elect and black citizens are excluded from the slating process, there would be ample reason for a federal court to be skeptical about the validity of the at-large voting scheme. In this case none of these features are present. On the contrary, the district is small, election is by plurality and blacks have free access to the slating process.

In that same opinion (David v. Garrison) the Court also made it clear that the Constitution does not require

that elections must be somehow so arranged that black voters be assured that they can elect some candidate of their choice and that an at-large system of election is not to be regarded as unconstitutional merely because a minority of voters cannot elect a candidate from among themselves. A fortiori, that at-large system in Moultrie is not to be condemned when the minority group can - and has - elected a candidate from among its members.

The prayers of the Plaintiffs' complaint are denied and it is directed that the complaint be dismissed. Judgement will be entered accordingly.

This 26th day of October, 1977.

S/J. Robert Elliott
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
THOMASVILLE DIVISION

JOHN W. CROSS, et al.,

Plaintiffs

v.

LLOYD BAXTER, et al.,

Defendants

Civil Action No. 76-20-THOM

[March 25, 1980]

SUPPLEMENTAL OPINION AND ORDER

By its opinion the Court of Appeals found that this Court's opinion previously filed in this case did not deal with evidentiary matter with that degree of specificity required by Rule 52 of the Federal Rules and remanded the matter for further elaboration in certain areas. The Court

held a further evidentiary hearing on January 25, 1980 and now files this opinion which is intended to be supplemental to this Court's prior opinion. In the interest of clarity we will address the areas which the Court of Appeals deemed deficient in the same order in which they were mentioned by the Court of Appeals.

A. Denial of access to the electoral process.

After a careful consideration of all the evidence the Court again finds no denial of access.

As stated by the Court of Appeals, certain evidence at the first hearing tended to show that "official discrimination that deters political participation by blacks has not ended in Moultrie". The supervision of elections by the all-white Lions Clubs and the moving of a

polling place are pointed out.

The Court finds that a number of years ago local officials were having difficulty in obtaining qualified workers to hold elections and were approached by the all-white Lions Club which wished to and did undertake the job as a civic project. In recent years Plaintiffs and other blacks have complained that no blacks have participated in the conduct of the elections. Several years ago a white councilman who is no longer serving went to the Lions Club and made arrangements for blacks to assist in holding elections and relayed this information back to black citizens. It appears that blacks did attempt to assist in the election, approached an election manager other than the one whom the councilman had contacted, and were refused, but this information was not relayed back to the councilman, who

assumed that no effort had been made by the blacks to assist in that election. Prior to a recent election, blacks again asked for an opportunity for citizens other than members of the Lions Club to participate in supervising the election, and in response to this the City advertised for assistance from any electors. As a result of this ad only three people responded, two whites and one black, and all worked at that election. The council in a meeting on June 20, 1978, in response to a letter from the Plaintiff Cross, as President of the Moultrie Mens Club, unanimously agreed to seek a way for one-third of the people involved in the conduct of an election to be chosen from the city at large. Councilman Ball, the present black member of the council, approached the Woman's Federated Club, a black women's organization, and that

club has now agreed to and has been designated by the council to supervise the conduct of the 1980 municipal election and future elections jointly with the Lions Club. Based upon the foregoing findings of fact the Court concludes that such conduct did not constitute impermissible discrimination.

Based upon the evidence adduced at the hearing held on January 25 the Court finds that the polling place in question was moved from the city hall for logical reasons of conveninece and was not racially motivated. The only place in the city hall large enough to accommodate the election was the fire department, and it necessitated moving equipment out of the fire department and the firemen operating around the crowds at the polls. Further, both the city and the county governments adopted the use of voting machine instead

of paper ballots and wanted to find a location for the Moultrie precinct where the machines might be kept on a permanent basis so that they would not have to be moved from storage to city hall for city elections and from storage to the county polling place for county elections. The city gymnasium suited this purpose and is centrally located, as indicated by the maps introduced into evidence by the Defendants. Further, the Court finds that the question of moving the polling place was submitted to the United States Department of Justice for approval at the time the move was contemplated and that the Justice Department communicated with the Plaintiff Cross and that no objection was made to moving the polling place. It appears that all candidates offer rides to the polls for voters, and that voters only have to call a number in order to

receive a free ride to the polls. Finally, the moving of the polling place appears to have had no effect on black participation, as is more fully discussed below. Based upon the foregoing, the Court finds that both of these matters pointed out by the Court of Appeals, while suspect on their face, when examined do not constitute discrimination.

In the last analysis, actual participation in the electoral process is most indicative of access. According to the 1970 census (the last period for which accurate figures are available), there were 9,065 persons of voting age residing in Moultrie. Of these, 6,375 or 70.3% were white and 2,683 or 29.7% were black. The total number of persons registered to vote in the 1979 election was 4,788. Of those, 3,321 or 69.4% were white and 1,467 or 30.6% were black. 2,436 electors

voted in the 1979 election. Of those, 1,693 or 69.5% were white and 743 or 30.5% were black. Thus, it appears that slightly more eligible blacks were registered to vote than were eligible whites and that 50.6% of the registered blacks voted and 51% of the registered whites voted, a variance so slight as to be insignificant.

It is interesting to note that in that election the winning candidate, a black, received 965 votes. Wilson, the black incumbent, received 842 votes, and the white candidate received 603 votes. Assuming that all black votes were cast for black candidates, 62.8% of the white votes were, of necessity, cast for the two black candidates.

While, as stated by the Court of Appeals, some black candidates have not felt comfortable in campaigning house to house in white neighborhoods, the last

successful black candidate, Councilman Ball, indicated that he had no problem in seeking white support. The Court also recognizes the existence of socioeconomic inequities and past educational inequalities (since corrected), but finds that in spite of these problems the statistics show that blacks are participating with equal access in the political process in Moultrie.

B. Effect of past discrimination on present participation in political process.

While in its former opinion this Court stated that in Moultrie 44.6% of the whites and 26.9% of the blacks were registered to vote, as shown above there were 6,375 whites of voting age, of whom 3,321 or 52% were registered to vote in the 1979 election, and 2,683 blacks of voting age, of whom 1,467 or 54.7% were registered to

vote in the 1979 election. Based upon the stipulation of the parties at the June 3, 1977 hearing, there were then 5,500 registered voters, of whom 4,163 were white and 1,337 were black, Thus, at that time 65.3% of the eligible whites were registered and 49.8% of the eligible blacks were registered.

There is much evidence in the record of efforts on the part of blacks to increase the number of registered blacks and the evidence also shows that the predominately white council has in recent years been supportive of this effort in extending hours of registration and designating locations within the minority community to afford easy access to registration. The figures set out above indicate that such efforts have been successful; indeed, proportionately, slightly more blacks than whites are registered.

While there has been an unquestioned disparity between the number of minority residents and the number of minority representatives, the Court finds that such, standing alone, is not conclusive in this case. Zimmer v. McKeithen, 485 F.2d 1297, 1305.

The Court concludes that past discrimination does not have a present effect of diluting the minority vote in the political process.

C. Responsiveness to minority needs.

Here the Court of Appeals lists several items requiring further discussion. These include (1) a comparison of recreational facilities in black and white areas, (2) the racial composition of the various public housing projects. (3) segregated voter lists, (4) compliance with §5 of the Voting Rights Act of 1965, (5) operation of racially segregated

jails, (6) racially selective enforcement of laws by city policy, (7) paving in black neighborhoods and (8) city hiring practices.

Recreational facilities. At the January 25, hearing the director of the city recreational program testified with regard to the relative quality of the physical facilities and programs in the various areas of the city. He testified that the city has acquired from the school system the gymnasium located adjacent to its pool and between the pool and the youth center in northwest Moultrie (the predominately black area) and is renovating it for use in that community, has taken bids for the rebuilding of the youth center which was recently damaged by fire, described the location and number of facilities in northwest Moultrie as being fewer but equal to those in other areas, described the facilities in southwest

Moultrie and the present renovation of the swimming pool located in that area, and described the complex in southeast Moultrie which is the newest and which is located in the vicinity of a minority group living in that neighborhood, as indicated in the shaded area on Defendants' exhibit, and adjacent to an integrated apartment complex. He further described the extensive participation in the present program at all complexes by whites and blacks alike. Based upon these facts, the Court concludes that the city recreational program is responsive to all elements of the community.

Public housing. While there is no statistical evidence showing the exact racial composition of the various housing projects within the city, witnesses at the January 25 hearing testified that the amount of racial integration is substantial

in all housing projects within the city with the exceptions of one project located in a predominately black neighborhood. The Court finds no high degree of de facto segregation in public housing in Moultrie, and there is no unresponsiveness in connection therewith.

Voter lists and non-compliance with Voting Rights Act. Voter lists have not been segregated since sometime prior to 1967 and while the city did not comply with the requirements of §5 of the Voting Rights Act of 1965 in submitted an amendment to its charter enacted in the spring of 1965 requiring a majority vote for election, it is interesting to note that that failure has in fact operated to Plaintiffs' advantage. The State Municipal Election Code, submitted to and approved by the Justice Department, contains a majority vote requirement if no

contrary charter requirement obtains. Moultrie's charter required only a plurality prior to 1965, and the elimination of the majority vote requirement enabled Councilman Wilson to become the first successful black candidate. Because of the foregoing, and in view of the council's affirmative efforts to increase black voter registration as discussed above, the Court finds no unresponsiveness here.

Racially segregated jails and racially selective enforcement of laws. The Court of Appeals noted and this Court recognizes that at the original evidentiary hearing Plaintiffs presented a former policeman who testified with regard to segregation in the city jail and with regard to discriminatory enforcement of the law by the police department during the mid-1960's. At the January 25 hearing there was uncontradicted testimony by the chief of

police that the jail has not been operated on a segregated basis since the new City hall was constructed in the mid-1960's and that law enforcement within the city is administered without regard to race, creed or color. The Court finds that such is at least the official policy of the city and has been in recent years.

Paving in black neighborhoods. This Court noted in its prior opinion that expenditures for paving in black neighborhoods exceed such expenditures in white neighborhoods, but as stated by the Court of Appeals, if the need was greater in black neighborhoods than in white, allocating a mere majority of the paving funds to black neighborhoods would indicate unresponsiveness rather than responsiveness. At the January 25 hearing the Defendants introduced maps and testimony which show that upon completion of the city's current paving program there will

be more unpaved streets in white neighborhoods than in black neighborhoods, and that the remaining unpaved streets in the predominately black section of town will almost all lie in an uninhabited area lying east of the town's west by-pass. This evidence is clearly indicative of responsivenss.

City hiring practices. The Court of Appeals notes that this Court's former opinion is not clear as to the content of the city's affirmative action plan, and suggests that the precise content of that plan be spelled out. As introduced in evidence at both hearings, the plan consists of some 22 typed pages. It is best summarized in its "statement of policy" and contains statistical information valid at September 30, 1976. The statement of policy is as follows:

"Statement of Policy

The City of Moultrie recognizes that equal employment opportunities in the city government can only be fully achieved through a firm commitment to the concept of affirmative action. The city further recognizes that it has a moral as-well-as legal obligation to its minority citizens to provide equal employment opportunity.

Therefore, in accordance with the above, the City of Moultrie:

1. Reaffirms its policy that there shall be no discrimination on the basis of race, color, religion, national origin, marital status, age or sex in hiring of applicants or treatment of city personnel.

2. Will attempt to establish a ratio of minority and female employees which reflects their actual qualified presence in the general working population.

3. Will establish procedures for periodically monitoring progress toward attainment of this ratio.

4. Will establish personnel procedures and necessary policies to insure a constant and continuing commitment to the full utilization of minorities and women in all aspects of city government. Furthermore, affirmative action efforts shall

be directed toward city recruiting efforts, selection and advancement of employees, and all other aspects of the city personnel policy including but not limited to layoffs, retirement, training, transfers, compensation determinations, and employee benfits."

The city manager testified that all employees of the city have been encouraged to assist the city administration in its efforts to find qualified blacks and females to fill vacancies in city jobs, that the city has advertised extensively for such persons, and has actively recruited at Albany State College, a predominately black institution. Increases in minority representation have occurred in all but one category. The Court again finds there to be an active effort on the part of the council to remedy the disparity in the make-up of the city's labor force, sufficient to rebut any inference of unresponsivenss.

Finally, the Court of Appeals had directed this Court to make subsidiary findings of fact with regard to whether or not segregated private housing patterns in Moultrie are attributable to past intentional discrimination by the city. There is no evidence in the record that such patterns have been planned, suggested or dictated by the city government; indeed, there was evidence introduced at the January 25 hearing showing that the city, in obtaining housing for blacks displaced by the city's program to eliminate substandard housing, has sought and obtained such replacement housing in formerly all-white neighborhoods. Racially identifiable neighborhoods are a fact of life in most American cities and town. Moultrie appears to be no better and no worse than most.

The Court has again carefully considered the evidence in this case, with special emphasis on those matters enumerated by the Court of Appeals. Again, this Court finds that blacks have free access to the electoral process, that past discrimination does not preclude effective participation by blacks in the electoral system today, that the city government is not unresponsive to the needs of the black community, and that the at-large system is neither unusual nor contrary to state policy.

The prayers of the Plantiffs' complaint are denied, and the complaint is dismissed.

IT IS SO ORDERED this 24th day of March, 1980.

S/J. ROBERT ELLIOTT
UNITED STATES DISTRICT JUDGE

Section 2 of the Voting Rights Act, 42 USC §1973:

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any state or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), as provided in subsection (b).

(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the state or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity

than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the state or political subdivision is one "circumstance" which may be considered, provided that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

Office-Supreme Court, U.S.
FILED
MAR 14 1983
ALEXANDER L. STEVAS,
CLERK

NO. 82 - 1360

IN THE

Supreme Court of the United States

October Term, 1982

JOHN W. CROSS, JERRY J. DENEGALL and FRANK WILSON, individually and on behalf of all others similarly situated,

Petitioners,

v.

LLOYD BAXTER, HENRY KLAR, DONNIE TURNER, WESLEY BALL and SHERROD McCALL, individually and as members of the City council of Moultrie, Georgia; WILLIAM B. WITHERS, individually and as Mayor of the City of Moultrie, Georgia; MRS. RENNIE TUMLIN, individually and as Municipal Election Superintendent for the City of Moultrie, Georgia; W. E. KELLY, W. B. LINDER and E. W. RHODEN, JR., individually and as Municipal Election Managers for the City of Moultrie, Georgia; and their successors in office,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

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STATEMENT OF THE CASE

Petitioners take the position that both the District Court and the Court of Appeals failed to consider their §2 claim. With this we disagree. The amended §2 deals with result instead of intent.

The Court of Appeals in Cross I, ***Cross v. Baxter***, 604 F.2nd 875 (5th Cir. 1979), applying the criteria set out in ***Zimmer v. McKeithen***, 485 F.2nd 1297 (5th Cir. 1973), held that four specific areas of inquiry were particularly important, the second of such areas being "whether past discrimination has the present effect of discouraging minority members' participation in the electoral process". Pet. for cert. 15a, 16a. The Court of Appeals found "the purpose of inquiring into these areas is to determine whether an electoral system that is unobjectionable in the abstract, nevertheless, on the specific facts presented, has the effect of diluting the impact of a minority's voting power, and whether it is intended to have such an effect." Pet. for cert. 17a.

The Court of Appeals further held that the petitioners had introduced sufficient evidence of past discrimination to shift the burden to defendants to demonstrate that such past discrimination does not preclude present effective participation by blacks in Moultrie's electoral system, that the District Court had misplaced the burden of proof and that the District Court had reached conclusions without discussing substantial relevant contrary evidence to meet the requirements of Rule 52(a) of the Federal Rules of Civil Procedure. The case was reversed and remanded with instructions for the District Court to reconsider on the basis of instructions in the opinion of the Court of Appeals.

It was then that the District Court held the further evidentiary hearing and made its findings of fact and conclusions of law. Part B of the supplemental opinion and order of the District Court dealt specifically with "effect of past discrimination on present participation in political process", Pet. for cert. 95a, and after discussing the evidence the District Court concluded "that past discrimination does not have a present effect of diluting the minority vote in the political process". Pet. for cert. 97a.

The Court of Appeals affirmed. ***Cross v. Baxter***, 639 F.2d 1383 (5th Cir. 1981).

After this Court's decision in ***Rogers v. Lodge***, _____ U.S. ____, 102 S. Ct. 3272 (1982), the Court of Appeals supplemented its holding and pointed out that "the trial court made extensive findings of fact and conclusions of law" after its remand, Pet. for cert. 9a. It found the findings of fact were not clearly erroneous, and that the trial court's conclusions of law were based upon its mandate and the authorities cited therein.

Petitioners improperly attempt here and attempted before the Court of Appeals to inject "legislative history" of 1982 amended §2 to prove a fact on appeal. Pet. for cert. 12-18. While legislative history is useful to determine legislative intent, it cannot replace or supplement evidence introduced in a trial court, for obvious reasons. In addition, the statement in the "legislative history" is an inaccurate statement of statements of the Court of Appeals in Cross I with regard to the inference of past previous discrimination and a history of pervasive discrimination. ***Cross v. Baxter***, supra 881, Pet. for cert. 18.

REASONS FOR DENYING WRIT

The trial court on remand considered the evidence of past discrimination and determined that it has no present effect on minority participation in the electoral process. Such is the basis of petitioners' §2 claim and the same has been decided against them under Rule 52(a). This petition is no more than an effort by petitioners to reargue the facts. The Court of Appeals correctly applied Rule 52(a) in that the findings of fact of the District Court were not clearly erroneous. See ***Pullman Standard v. Swint***, ***United States Steelworkers v. Swint***, 456 U.S. ____, 102 S. Ct. 1781 (1982).

The panel in the Court of Appeals which decided this case also decided ***Lodge v. Buxton***, 639 F.2nd 1358 (5th Cir. 1981) and the decisions are consistent.

CONCLUSION

Petitioners have had their constitutional and statutory claims carefully considered in the trial court, on remand after specific instructions from the Court of Appeals, and the case has been decided against them on the facts.

The District Court has determined that even under petitioners' interpretation of their §2 claim, respondents have carried the burden of proof, and the Court of Appeals has found the trial court's findings to be not clearly erroneous under Rule 52. This petition is no more than an effort by petitioners to have this Court again review their case on the facts. Such is clearly not within the purview of Rule 17 of this Court, and the petition for the writ of certiorari should be denied.

Respectfully submitted,

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